Supreme Court, U.S.
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No.

78

In the

Supreme Court of the United States

In re: JON ZAVALIDROGA,
Petitioner.

Jon Zavalidroga

v.

United States District Court
for the Northern District of California

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Ninth Circuit

Prepared by:

Jon Zavalidroga, pro se
3263 Forward Road
Blossvale, New York 13308

THE QUESTION FOR REVIEW

No federal court has jurisdiction to adjudicate the untimeliness of an in-custody 28 U.S.C. 2255 proceeding where a 2255 motion was neither filed nor construed. See e.g. United States v. Leon, 203 F.3d 162, 164 (2nd Cir. 2000) ("In short, we hold – as every other court to consider the issue thus far has held – that a federal court lacks jurisdiction to consider the timeliness of a 2255 petition until a petition is actually filed."). Also, Miller-El v. Cockrell, Director, Texas Department of Criminal Justice, Institutional Division, 537 U.S. 322, 336 (2003) (Until a Certificate of Appealability under 28 U.S.C. 2253 (c) (1) has been issued, federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.).

Nevertheless, the Ninth Circuit has sua sponte adjudicated the untimeliness of a 28 U.S.C. 2255 nonproceeding.

The petitioner has been deprived of his right under the United States Constitution, Article I, to have any habeas proceeding at all. The Ninth Circuit's adjudication of a 28 U.S.C. 2255 nonproceeding also violates the United States Constitution, Article III, which mandates a 'case or controversy' requirement.

PARTIES TO PROCEEDING

1) The federal prosecutor in District Court Case #CR-96-0146 MMC:

Karen Beausey
U.S. Attorney's Office
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, California 94102

2) The district court in which trial docket #CR-96-0146 was held:

Honorable Maxine Chesney
United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

3) Simultaneously with this Petition for Certiorari, a separate petition for similar judicial relief is pending in the Ninth Circuit Court.

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94119

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OPINIONS BELOW

No lower court's opinion has been published in either the Federal Reporter or in the Federal Supplement. The following lower-court proceedings have been decided in approximate reverse-chronological order.

The unpublished Ninth Circuit Order 07-71449 denied a Writ of Prohibition on August 1, 2007 (Appendix A).

The also unpublished previous Ninth Circuit Order 06-74317 denied a Writ of Mandamus on December 6, 2006 (Appendix B).

The Ninth Circuit Memorandum 05-10646, filed March 17, 2006, can be referenced at 171 Fed. Appx. 603; 2006 U.S. App. LEXIS 6857 (Appendix D). The Ninth Circuit denied a rehearing and a rehearing en banc on June 14, 2006 (Appendix C). The Appeal 05-10646 had been taken from two related orders of the United States District Court for the Northern District of California, case CR-96-0146MMC, which were filed on September 13, 2005 (Appendix G) and September 26, 2005 (Appendix F).

The unpublished Ninth Circuit Order 05-76533 denied a Writ of Mandamus on January 30, 2006 (Appendix E).

The Ninth Circuit Memorandum 04-10019, filed June 22, 2004, can be referenced at 101 Fed. Appx. 721; 2004 U.S. App. LEXIS 12447 (Appendix L). The Ninth Circuit simultaneously denied a rehearing and a rehearing en banc on August 23, 2004 (Appendix K). The Ninth Circuit denied a

recall of the mandate #04-10019 on August 18, 2005 (Appendix H). The United States Supreme Court denied certiorari at 543 U.S. 1035 (Appendix J); a rehearing was denied at 543 U.S. 1178 (Appendix I). Ninth Circuit Appeal 04-10019 had been taken from an order of the United States District Court for the Northern District of California, case CR-96-0146MMC, filed December 11, 2003 (Appendix M).

The Ninth Circuit Memorandum 01-10432, filed December 9, 2002, can be referenced at 53 Fed. Appx. 411; 2002 U.S. App LEXIS 25581(Appendix P). The Ninth Circuit denied a panel rehearing on July 8, 2003 (Appendix O). The United States Supreme Court denied certiorari at 540 U.S. 882 (Appendix N). The Ninth Circuit Appeal 01-10432 had been taken from an order of the United States District Court for the Northern District of California, case CR-96-0146MMC, filed July 9, 2001 (Appendix Q).

The Ninth Circuit Memorandum 00-10324, filed January 24, 2001, can be referenced at 2 Fed Appx. 787; 2001 U.S. App LEXIS 1130 (Appendix S). The Ninth Circuit also sua sponte recalled and then immediately reissued Mandate 00-10324 on June 1, 2001 (Appendix R). The Ninth Circuit Appeal 00-10324 had been taken from an order of the United States District Court for the Northern District of California, case CR-96-0146MMC, which was filed on June 1, 2000 (Appendix T).

An unpublished order from the United States District Court for the Northern District of California denied a Writ of Mandamus in case CR-96-0146MMC on May 3, 2000 (Appendix U).

STATEMENT OF JURISDICTION

Ninth Circuit Jurisdiction:

The Ninth Circuit #07-71449 had jurisdiction to remedy assertions of jurisdictional defects under the authority of 28 U.S.C. 1653. The Ninth Circuit additionally had jurisdiction to issue an extraordinary writ under the authority of 28 U.S.C. 1651.

Supreme Court Jurisdiction:

The Ninth Circuit #07-71449 denial of a Writ of Prohibition on August 1, 2007 began the 90-day period for filing a petition for certiorari under Supreme Court Rule 13(1). The initial petition for certiorari was first-class mailed on October 26, 2007 in a timely manner under Supreme Court Rule 29(2).

However, in a letter dated October 30, 2007, the Supreme Court Clerk returned the petition, and granted a 60-day filing extension for correction of various formatting deficiencies. This corrected Petition for Certiorari was timely resubmitted under Supreme Court Rule 14(5) within 60 days of the date on the Supreme Court Clerk's letter.

The United States Supreme Court has jurisdiction for an appeal based upon 28 U.S.C. 1254. The Supreme Court may also issue mandamus or other extraordinary writs under the jurisdiction of 28 U.S.C. 1651.

Although the Ninth Circuit has never possesed authorized jurisdiction to adjudicate the untimeliness of a 28

U.S.C. 2255 nonproceeding, the Supreme Court still has its own jurisdiction to consider the Ninth Circuit's lack of jurisdiction; Hohn v. United States, 524 U.S. 236, 246 (1998) (Regardless of whether a circuit court of appeals had jurisdiction during either a 28 U.S.C. 2253 certificate of appealability proceeding or in a 28 U.S.C. 2255 proceeding, the Supreme Court thereafter always retains its own jurisdiction to consider the appeals court's jurisdiction.).

Supplemental Jurisdictional Statement, Supreme Court Rule #11, Certiorari to a United States Court of Appeals Before Judgment

A separate original proceeding is presently pending for the Ninth Circuit to recall its jurisdictionally deficient Mandate #00-10324 (refer to Ninth Circuit Order #00-10324 (Appendix R herein). However, the mandate #00-10324 terminated with the sentence, "There also shall be no further filings accepted in this closed case." It is presently several weeks since the Ninth Circuit's receipt of the recall petition on September 24, 2007, and the recall petition has still not been filed, i.e. the closed case #00-10324 has not yet been reopened.

Simultaneously while a petition for certiorari is pending in the Supreme Court, the Ninth Circuit still has jurisdiction to recall its Mandate #00-10324; Hawaii Housing Authority v. Midkiff, 463 U.S. 1323 (1983) (The authority of an appeals court to recall its own mandate is entirely discretionary with the appeals court.). Also simultaneously while the Ninth Circuit considers a recall of its own mandate, the Supreme Court has its own jurisdiction under 28 U.S.C. 2101 (e) to issue either certiorari or another applicable writ.

STATEMENT OF STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Article I, Section 9, Clause 2

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

United States Constitution, Article III, Section 2, Clause 1

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to all controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming land grants of different States, and between a state, or the citizens thereof, and foreign states, citizens, or subjects."

(continued)

The Antiterrorism and Effective Death Penalty Act of 1996

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) - Title I - Habeas Corpus Reform, Section 105 Amendments, added a statute of limitations to 28 U.S.C. 2255. The provision states in pertinent part:

A one-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of --

1) the date on which the judgment of conviction becomes final;

2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(end of statute)

STATEMENT OF THE CASE

At a jury trial in the United States District Court for the Northern District of California in 1996, defendant Jon Zavalidroga was found not guilty of Count One, mailing a threatening communication in violation of 18 U.S.C. 876; and guilty of Count Two, leaving a threatening voice message on a telephone-answering machine in violation of 18 U.S.C. 875.

During a series of sentence hearings, the defendant explained to the trial court that the Government prosecutor had underhandedly manipulated the sounds on the tape-recorded trial evidence, and that the defendant's ineffective public defender had repeatedly refused during the trial to raise the tampered trial-evidence issue. The Government prosecutor repeatedly denied at each sentencing that the tape-recorded evidence had been altered. The defendant insisted that the prosecutor's statements were a complete perjury as to the authenticity of the recorded evidence. The district court stated that it would not permit Zavalidroga's conviction to remain standing in the face of any Government alterations to the tape-recorded trial evidence.

At the defendant's request, the district court appointed a special private attorney to appeal the issue of prosecutorial tampering with the tape-recorded trial evidence. The sentencing judge stated that she would prepare a confidential inter-court written statement for the Ninth Circuit appeal in regard to the district court's stipulation that prosecutorial alterations to the tape-recorded evidence would not be tolerated.

Unknown to the defendant, from literally before the moment of the appellate attorney's formal court appointment, the appointed attorney had already conspired to lose his own case by with any fraud which would become necessary to ascertain that the claim of tampered tape-recorded evidence would never be presented in any appeal.

During the 20 months after the defendant's conviction was affirmed on the attorney-prepared direct appeal, the appellate attorney's written correspondence and telephone communications with the defendant included the primary fraud of a phony trial-evidence procurement agreement. The appellate attorney explained to his client that a court agreement had permitted the Government prosecutor to provide a copy of the tape-recorded trial evidence to the court, with the stipulation that the appellate attorney himself chose the expert who evaluated the evidence for manipulation.

When the defendant discovered that no trial-evidence agreement existed, and that the appellate attorney's own chosen expert was a complete fraud, the defendant immediately compiled the relevant attorney-client correspondence and mailed it with a letter of injustice to the district court. By this time, the defendant's prison sentence and three-year term of supervised release were within four months of expiring.

While still within the district court's probational custody, the defendant filed district court petitions for a 28 U.S.C. 1651 mandamus review of his appellate attorney's fraud. The still-in-custody defendant never petitioned for either a 28 U.S.C. 2253 Certificate of Appealability or a 28 U.S.C. 2255 motion in either the district court or the Ninth Circuit. The defendant also never requested that any of his mandamus petitions to the district court should be recharacterized into a Section 2255 proceeding nor did any such recharacterization ever occur. The defendant deliberately filed a mandamus petition in the district court, and the district court definitively construed the defendant's petition as a request for mandamus relief; Castro v. United States, 540 U.S. 375 (2003) (A district court can not recharacterize a pro se litigant's filings into a 2255 motion unless the district court informs the litigant of the recharacterization and its legal consequences.). The district court denied mandamus relief, and the defendant filed a timely notice of appeal. Literally a few days later, the defendant's custody expired. The defendant did not have time to prepare a petition under statute 28 U.S.C. 2255(4) before his custody expired.

The defendant argued on the attendant Appeal #00-10324 that his case should have been reopened by the district court under mandamus authority of 28 U.S.C. 1651; see United States v. Morgan, 346 U.S. 502 (1954) (When a defendant's custody expires, 28 U.S.C. 2255 must be converted into 28 U.S.C. 1651 because Section 2255 contains a jurisdictional in-custody requirement.). No in-custody 28 U.S.C. 2255 motion was ever filed or construed at any time by any court. Also, most critically, no out-of-custody proceeding has ever been recharacterized or construed as a

judicially authorized substitute for a 28 U.S.C. 2255 motion or its habeas equivalent. The Ninth Circuit Appeal #00-10324 affirmed the district court's denial of mandamus relief; and sua sponte noted that 28 U.S.C. 2255 provides the exclusive procedural mechanism by which a prisoner may contest the legality of his detention, but that it would have been futile for the district court to have construed a 2255 motion because the defendant had not filed a petition under 28 U.S.C. 2255(1) within one year of the date when his conviction became final.

Thereafter, in a second Ninth Circuit Appeal #01-10432, the out-of-custody defendant argued that coram nobis should be granted because he would be eligible for a 28 U.S.C. 2255(4) proceeding if he still remained in custody. The defendant argued that, because his lack of custody had prevented him from filing a 2255(4) motion, the defendant had been deprived of his constitutional right to have any habeas proceeding at all. This second Ninth Circuit Memorandum #01-10432 denied relief upon the basis that "a petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements".

The defendant continued to contend in this second appeal's Petition For A Rehearing #01-10432 that he had in fact always previously met the AEDPA's gatekeeping requirement. The petitioner contended that the one-year filing period for a 28 U.S.C. 2255 motion could not begin, as was sua sponte decided by the first Ninth Circuit Memorandum #00-10324, one year from the date on which

the judgment of conviction became final under 2255(1). The defendant contended that his one-year filing period for a pro se 2255 motion correctly began under 2255(4) at the moment when the defendant's due diligence had first been able to discover his appellate attorney's fraud.

Section 2255(4) plainly states that, "The limitation period shall run from the latest of - - ". . .the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence". No court can possibly have had jurisdiction to sua sponte adjudicate which subsection of AEDPA would be applicable to the petitioner's in-custody 2255 habeas proceeding unless either the 2255 proceeding or its judicially authorized equivalent actually exists in the court. Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1937) (Judicial power of federal courts extends only to controversies, as distinguished from an advisory opinion advising what the law would be upon a hypothetical statement of facts.).

The first and second Ninth Circuit memorandums have both incorrectly relied upon Zavalidroga's in-custody mandamus proceedings as the basis to have decided the untimeliness of Zavalidroga's in-custody 28 U.S.C. 2255 non-proceeding. The petitioner again emphasizes that no in-custody 2255 proceeding was ever construed. Additionally, no out-of-custody judicially authorized substitute for an in-custody 2255 proceeding has ever been construed in any court proceeding.

Independent of authoritative precedents that no court has jurisdiction to adjudicate what would have been the timeliness of a 2255 non-proceeding, there still exists the

related question as to why the Ninth Circuit proceedings are inherently wrong. A mandamus proceeding can not authorize the jurisdiction which is necessary to adjudicate the timeliness of an in-custody habeas proceeding. Malone v. Calderon, 165 F.3d 1234 (9th Cir. 1999) (The All Writs Act does not operate to confer jurisdiction and may only be invoked in aid of jurisdiction which already exists.). The other federal circuits additionally concur that an in-custody mandamus proceeding does not substitute as authorized jurisdiction to adjudicate an in-custody 28 U.S.C. 2255 non-proceeding; e.g. United States v. Barrett, 178 F.3d 34 (1st Cir. 1999) (An in-custody petitioner may not utilize the All Writs Act 28 U.S.C. 1651 to raise a habeas claim which is cognizable only under the jurisdictional authority of 28 U.S.C. 2255.). Ex Parte Farrell, 189 F.2d 540, 545 (1st Cir. 1951) ("Where the appellate statutes establish the conditions of appellate review [such as timeliness], an appellate court can not rightly exercise its authority to issue a writ under the 'all writs' section, 28 U.S.C. 1651, the only effect of which would be to avoid those conditions and thwart congressional policy.").

Zavalidroga's second Appeal #01-10432 and third Appeal #04-10019 asserted that AEDPA is always equitably tolled in cases of appellate-attorney fraud, regardless of the judicial fact that a defendant's right to have counsel does not extend beyond a first appeal of right; e.g. Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000) (AEDPA is equitably tolled when the appellate attorney actively and purposefully functions as an agent in some sort of scheme or confidence game which was intended to trick the unwitting defendant into not discovering ineffective assistance of counsel on a direct appeal of right.).

At Zavalidroga's third appeal #04-10019, the Government prosecutor, for the first time argued for a "law of the case" to prevent Zavalidroga from explaining the supporting claim of equitable tolling of AEDPA 2255(4) in support of his claim of attorney fraud. The petitioner has filed several subsequent petitions to argue that a law of the case is never valid unless the case law is premised upon authorized jurisdiction. The petitioner's request for a recall and modification of the jurisdictionally deficient law-of-the-case proceeding #04-10019 has been denied. The Ninth Circuit has also declined to amend the jurisdictional defect via an appeal; and writs of prohibition and mandamus have also been denied. The Supreme Court should correct the Ninth Circuit's jurisdictional excess of having adjudicated the untimeliness of a jurisdictionally unauthorized in-custody 28 U.S.C. 2255 nonproceeding.

AMPLIFICATION OF REASONS FOR THE WRIT

The Ninth Circuit's adjudication of the untimeliness of a 28 U.S.C. 2255 nonproceeding conflicts with the precedents from most every federal circuit. Under Rule 10 (a), the Supreme Court should address this conflict which now exists between the Ninth Circuit's decision and all of the other federal circuits which have differently decided the same issue.

The Supreme Court's own holdings additionally prohibit any federal court from adjudicating the merits of a 28 U.S.C. 2255 nonproceeding when a Certificate of Appealability under 28 U.S.C. 2253 has not been construed in any court. Under the provision of Rule 10 (c), the Ninth Circuit's unauthorized jurisdictional excess should be corrected.

LEGAL ARGUMENT

1. No court has jurisdiction in a 28 U.S.C. 2255 proceeding where no Section 2255 motion was filed

No district court has jurisdiction to decide the timeliness of a 28 U.S.C. 2255 petition which was never filed; see Application of Wattanasiri, 982 F.Supp. 955, 957-958 (S.D.N.Y. 1997) (No case or controversy exists under Section 2255 in a district court unless a 2255 motion also exists in the district court. Jurisdictional power of the federal courts extends only to cases and controversies; U.S.C.A. Const. Art 3, Section 2, cl. 1.).

Additionally, no Court of Appeals has jurisdiction in a 28 U.S.C. 2255 proceeding unless a 2255 motion also exists; United States v. Leon, 203 F.3d 162 (2nd Cir. 2000) ("Court of Appeals lacked jurisdiction over appeal from denial of motion seeking permission to submit untimely motion to vacate inasmuch as no case or controversy existed, and therefore any opinion rendered would be merely advisory. U.S.C.A. Const. Art 3, Section 2, cl. 1; 28 U.S.C.A. 2255."). United States v. Leon, id., quoted further at 164: "In short, we hold – as every other court to consider the question thus far has held – that a federal court lacks jurisdiction to consider the timeliness of a Section 2255 petition until a petition is actually filed.".

No Supreme Court precedent directly confronts the issue that no court has jurisdiction in a Section 2255 proceeding which was never filed. The lack of a Supreme Court intervention would seem to be conditioned upon the fact that, because no lower court has ever asserted its own jurisdiction in a 28 U.S.C. 2255 nonproceeding, there has never been any necessity for the Supreme Court's intervention.

However, it has been definitively decided that a lower court must at the least construe a Certificate of Appealability before habeas jurisdiction exists; Miller-El v. Cockrell, Director, Texas Department of Criminal Justice, Institutional Division, 537 U.S. 322, 336 (2003) (Until a Certificate of Appealability under 28 U.S.C. 2253 (c) (1) has been issued, federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.).

The Federal Rules of Appellate Procedure, Rule #22, provides the mandatory requirement that a court must issue a Certificate of Appealability under the authority of 28 U.S.C. 2253. The Ninth Circuit Rule #22 concisely stipulates that the Ninth Circuit follows the general provisions of the Federal Rules of Appellate Procedure, Rule #22.

While Defendant Zavalidroga was in-custody, he never petitioned for either a 28 U.S.C. 2253 Certificate of Appealability or for a 28 U.S.C. 2255 motion from either the district court or from the Ninth Circuit. Neither court ever recharacterized the then-in-custody defendant's mandamus petitions into either a Section 2253 certification or a Section 2255 proceeding. The then-in-custody petitioner knowingly filed mandamus petitions in the district court, and the district court's orders definitively stated that the defendant's petitions were construed as requests for mandamus relief.

When the defendant's court custody later expired, both the district court and the Ninth Circuit refused to construe any of the then-out-of-custody defendant's petitions as a judicially authorized substitute for an in-custody 2255 proceeding. The courts asserted that they had already utilized an in-custody mandamus proceeding to have adjudicated a previous in-custody Section 2255(1) nonproceeding. The courts elided the petitioner's arguments that an in-custody mandamus proceeding does not confer the jurisdiction to adjudicate the merits of the timeliness as to an in-custody 28 U.S.C. 2255 nonproceeding. The courts have in effect deprived the petitioner of his habeas right under the United States Constitution, Article I, to have had literally any habeas proceeding at all.

Relevant federal circuit precedents, e.g. United States v. Leon, id., have uniformly held that an additional violation of the United States Constitution, Article III, would occur if any court adjudicated the timeliness of a habeas nonproceeding. Without the existence of a 28 U.S.C. 2255 proceeding, there exists no case or controversy for any court to adjudicate under Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (The Article III provision is a mandatory requirement upon every court that courts may rule only in "cases" or "controversies".). Allen v. Wright et al., 468 U.S. 737, 750-752 (1984) (Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies".). Defunis v. Odegaard, 416 U.S. 312, 316 (1974) (Under Article III, Section 2 of the United States Constitution, " 'the exercise of judicial power depends upon the existence of a case or controversy' ".).

Given that an Article III case or controversy is a mandatory requirement, there exists no way for any court to determine the merits of timeliness as to a case which does not fall within the confines of Article III; Steel Co. aka Chicago Steel & Pickling Co., v. Citizens for a Better Environment, 523 U.S. 83 (1998) at 97, note 2 (explaining the "broken circle" that a merits question can be given priority over a statutory standing question, and a statutory standing question can be given priority over an Article III question, but a merits question can not be given priority over an Article III question).

2. Law of the case doctrine is not created by a 28 U.S.C. 2255 proceeding which was never properly recharacterized

Pro se Defendant Zavalidroga did not even first know that the courts were going to adjudicate some sort of 28 U.S.C. 2255 proceeding until immediately after the time when the Ninth Circuit Memorandum #00-10324 issued with the Ninth Circuit's sua sponte note that Zavalidroga's 2255(1) non-petition would have been untimely.

Even after the Ninth Circuit Memorandum #00-10324 had sua sponte adjudicated the untimeliness of a 2255(1) nonproceeding, the petitioner was prevented from attempting to correct the Ninth Circuit's lack of 2255 jurisdiction. Due

to a filing error within the Ninth Circuit Court itself, the Ninth Circuit also later sua sponte recalled its mandate #00-10324, and then immediately reissued the mandate with the added conclusion, "There also shall be no further filings accepted in this closed case.". The petitioner contingently had no opportunity to request a recall of the #00-10324 to amend a lack of Section 2255 jurisdiction. It has only been now, after the passage of many subsequent proceedings in attempts to rectify the jurisdictional error, that the petitioner's instant Ninth Circuit petition to recall mandate #00-10324 can point out that it was an additional, but perhaps unforeseeable error for the Ninth Circuit to have stipulated that no further filings would be accepted in the closed case #00-10324. Perhaps even as of today, October 16, 2007, the Ninth Circuit will still decline accept any further filings to recall its jurisdictionally defective mandate #00-10324. If the Ninth Circuit was to not accept any further filings for a recall of its mandate, the circumstances would by that time be too late to petition for certiorari as to the Ninth Circuit's earlier orders.

The Supreme Court has held that a federal court can not give a pro se defendant a 28 U.S.C. 2255 proceeding without the defendant's knowledge that the 2255 proceeding actually exists; Castro v. United States, 540 U.S. 375 (2003) (A district court can not recharacterize a pro se litigant's filings into a 2255 motion unless the district court informs the litigant of the recharacterization and its legal consequences.).

Castro v. United States, id., also elucidates that a law of the case does not properly exist when a court adjudicates an unauthorized recharacterization of a pro se petitioner's first 2255 proceeding. The similarity with Zavalidroga's proceedings is that after Zavalidroga's first 28 U.S.C. 2255 nonproceeding was adjudicated, the courts have in effect counted the 2255 nonproceeding as a first 2255 petition, thereby preventing the petitioner from ever later filing a legitimate-jurisdiction 2255 petition or its jurisdictionally authorized out-of-custody habeas equivalent. Let there be no doubts that, when the courts adjudicated the untimeliness of Zavalidroga's 2255(1) nonproceeding, this never-recharacterized proceeding can not be later counted as a judicially authorized first 2255 proceeding under law of the case doctrine.

3. A discussion of the relief which is available to remedy 28 U.S.C. 2255 jurisdictional defects in the petitioner's proceedings

A writ of prohibition is generally the remedy when a court without jurisdiction decides an issue; Ex Parte Indiana Transportation Company, Petitioner, 244 U.S. 456 (1917) (Prohibition issues as a matter of right when a court acts without jurisdiction.).

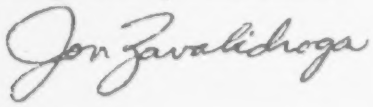
However, when an appeal or other remedy is available, then prohibition issues only as a matter of discretion; Ex Parte: In the Matter of the State of Oklahoma, by Charles N. Haskell, Governor, etc., Petitioner, 220 U.S. 191 (1911) ("Prohibition is an extraordinary writ which will issue against a court which is acting clearly without any jurisdiction whatever, and where there is no other remedy; but where there is another legal remedy by appeal or otherwise, or where the question of jurisdiction is doubtful or depends on matters outside the record, the granting or refusal of the writ is discretionary."). As an alternative to prohibition, there exists a first possible remedy of an appeal for certiorari to the Supreme Court. There may also exist another discretionary legal remedy of the Ninth Circuit being able to recall its mandate #00-10324. However, mandate #00-10324 has stipulated that no further filings will be accepted, so the question can not be answered as to if a remedy really exists via a petition to the Ninth Circuit for a recall of the mandate.

More complicatedly, no court has ever asserted that Section 2255 jurisdiction existed in any of Zavalidroga's proceedings. The district court and the Ninth Circuit have simply elided the Section 2255 jurisdictional requirements; and thereafter, these courts have refused to remedy their jurisdictional deficiency. Supreme Court precedents have already considered the issue that to force a court to take jurisdiction of a matter is a different question than to prohibit a court from enforcing an unauthorized jurisdiction which that court has claimed to possess; In re Simons, 247 U.S. 231 (1918) (In many cases, any one of many different writs, including the adoption of mandamus, can suffice to provide the identical judicial remedy.).

CONCLUSION

The Supreme Court should fashion judicial relief from the Ninth Circuit's 28 U.S.C. 2255 jurisdictional deficiencies with whatever remedy that the Supreme Court decides is most appropriate.

Respectfully submitted,



Jon Zavalidroga, pro se

Filed August 01, 2007

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JON ZAVALIDROGA No. 07-71449

Petitioner,

D.C. No. Cr-96-00146-MMC
Northern District of California,
San Francisco

JON ZAVALIDROGA,

Petitioner,

ORDER

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

Before: SCHRODER, Chief Judge, HAWKINS and WARDLAW, Circuit Judges.

This petition raises issues that the court disposed of in case Nos. 06-74317, 05-76533, 05-10646 and 04-10019. The petition is denied.

All other motions are denied as moot.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

Filed December 6, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: JON ZAVALIDROGA. No. 06-74317

JON ZAVALIDROGA, D.C. No. CR-96-146-MMC
Northern District of California
San Francisco

Petitioner,

v. ORDER

UNITED STATES DISTRICT COURT
FOR THR NORTHERN DISTRICT OF
CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

Before: LEAVY, GOULD, and CLIFTON, Circuit Judges

This mandamus petition raises issues that the court disposed of in case nos. 05-76533, 05-10646 and 04-10019. Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

Filed June 14, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JON ZAVALIDROGA, Defendant-appellant.	No. 05-10646 D.C. No. CR-96-00146-MMC Northern California (San Francisco) ORDER

Before: CANBY, BEEZER, and KOZINSKI, Circuit Judges

The panel has voted to deny the petition for panel rehearing. Judge Kozinski has voted to deny the petition for rehearing en banc, and Judges Canby and Beezer so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings will be accepted in this closed case.

Filed March 17, 2006

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 05-10646

Plaintiff-Appellee, D.C. No.CR-96-00146-MMC

v. MEMORANDUM*

JON ZAVALIDROGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted March 8, 2006**

Before: CANBY,BEEZER, and KOZINSKI, Circuit Judges.

Former federal prisoner Jon Zavalidroga appeals pro se the district court's denial of his petition for "Writ of Error Coram Nobis to Redress Jurisdictional Flaws." We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The district court did not abuse its discretion when it declined to consider Zavalidroga's contentions that the Ninth Circuit erred in its prior rulings in this case. See United States v. Alexander, 106 F.3d 874, 876-877 (9th Cir. 1997) ("Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.' "), citing Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993).

AFFIRMED.

Filed January 30, 2006

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JON ZAVALIDROGA No. 05-76533

JON ZAVALIDROGA, D.C. No. CR-96-00146-MMC
Northern California
Petitioner, (San Francisco)

v.

ORDER

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

Before: T.G. NELSON, SILVERMAN, and BYBEE, Circuit Judges

Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied. No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

Filed September 26, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JON ZAVALIDROGA, Defendant _____/	No. CR 96-0146 MMC ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF ERROR CORAM NOBIS; DIRECTIONS TO CLERK

Before the Court is defendant's Jon Zavalidroga's motion, filed September 23, 2005, for reconsideration of the Court's Order Denying Defendant's Petition for Writ of Error Coram Nobis. Because defendant fails to set forth any cognizable basis to reconsider the order, the motion is hereby DENIED.

The Clerk of the Court is directed to file the defendant's Notice of Appeal. 1

IT IS SO ORDERED.

Dated: September 26, 2005

"s/ Maxine M. Chesney"
MAXINE M. CHESNEY
United States District Judge

1 Defendant requested that the Clerk not file his notice of appeal unless his motion for reconsideration was denied.

Filed September 13, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

JON ZAVALIDROGA,
Defendant
/

No. CR 96-0146MMC

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF ERROR CORAM NOBIS

The Court is in receipt of defendant's Jon Zavalidroga's petition, filed September 12, 2005, titled, "Petition for a Writ of Error Coram Nobis to Redress Jurisdictional Flaws."

Because the Ninth Circuit has affirmed the Court's previous orders, and because this Court has no jurisdiction to consider defendant's argument that the Ninth Circuit erred, the petition is hereby DENIED.

IT IS SO ORDERED.

Dated: September 13, 2005

"s/ Maxine M. Chesney"
MAXINE M. CHESNEY
United States District Judge

Filed August 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JON ZAVALIDROGA,
Defendant-Appellant.

No. 04-10019

D.C. No. CR-96-146MMC
Northern California

ORDER

Before: LEAVY, THOMAS, and FISCHER, Circuit Judges

The motion to recall the mandate is denied. No further filings shall be accepted in this closed appeal.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 22, 2005

Mr. Jon Zavalidroga
3263 Forward Road
Blossvale, New York 13308

Re: Jon Zavalidroga
v. United States
No. 04-638

Dear Mr. Zavalidroga:

The Court today entered the following order in the above-entitled case:

The petition for rehearing is denied.

Sincerely,

"s/ William K. Suter"

William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 13, 2004

Mr. Jon Zavalidroga
3263 Forward Rd.
Blossvale, NY 13308

Re: Jon Zavalidroga
v. United States
No. 04-638

Dear Mr. Zavalidroga:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

"s/William K. Suter"

William K. Suter, Clerk

Filed August 23, 2004

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 04-10019

Plaintiff-Appellee, D.C. No. CR-96-146 MMC
Northern California

v.

JON ZAVALIDROGA ORDER

Defendant-Appellant.

Before: LEAVY, THOMAS, and FISHER, Circuit Judges

Judges Thomas and Fisher have voted to deny appellant's petition for panel rehearing and petition for rehearing en banc, and Judge Leavy so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Filed June 22, 2004

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 04-10019

Plaintiff-Appellee, D.C. No. CR-96-147-MMC

v.

JON ZAVALIDROGA, MEMORANDUM *

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, DISTRICT Judge, Presiding

Submitted June 15, 2004**

Before: LEAVY, THOMAS, and FISHER, Circuit Judges

Jon Zavalidroga appeals pro se the district court's denial of his "Petition for a Mandamus Review of Previous District Court Orders and Their Ninth Circuit Affirmations." We affirmed on direct appeal Zavalidroga's conviction and

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

sentence for transmitting a threatening communication in interstate commerce. United States v. Zavalidroga, No. 97-10290, 1998 WL 403361 (9th Cir. July 7, 1998) (memorandum). We affirmed the denial of his mandamus petition to reopen criminal proceedings, holding that the sole mechanism for challenging his federal detention would have been a motion pursuant to 28 U.S.C. 2255, but that the statute of limitations had expired. United States v. Zavalidroga, No. 00-10324, 2001 WL 68337 (9th Cir. Jan. 24, 2001) (memorandum). We affirmed the denial of Zavalidroga's coram nobis petition, holding that he could not circumvent 2255's statute of limitations by filing a coram nobis petition. United States v. Zavalidroga, No. 01-10432, 2002 WL 31761788 (9th Cir. Dec. 9, 2002) (memorandum). He then filed his mandamus petition, arguing that due to fraud by his attorney on direct appeal, relief was not barred by 2255's statute of limitations. Zavalidroga's arguments are barred by law of the case. See United States v. Alexander, 106 F.3d 874,876 (9th Cir. 1997). Accordingly, we affirm the district court's order.

AFFIRMED.

Filed December 11, 2003

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR 96-0146MMC

Plaintiff,

v.

JON ZAVALIDROGA,

Defendant

/

ORDER DENYING DEFENDANT'S PETITION FOR MANDAMUS REVIEW OF PREVIOUS DISTRICT COURT ORDERS AND NINTH CIRCUIT AFFIRMANCES

The Court is in receipt of defendant's Jon Zavalidroga's petition, filed December 10, 2003, titled "Petition for a Mandamus Review of Previous District Court Order and Their Ninth Circuit Affirmative."

The Ninth Circuit having affirmed the Court's previous orders, the petition is hereby DENIED. No further filings shall be accepted in this closed case.

IT IS SO ORDERED.

Dated: December 11, 2003

"s/ Maxine Chesney"
United States District Judge

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 6, 2003

Mr. Jon Zavalidroga
3263 Forward Rd.
Blossvale, NY 13308

Re: Jon Zavalidroga
v. United States
No. 03-299

Dear Mr. Zavalidroga:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

"s/ William K. Suter"

William K. Suter, Clerk

Filed July 8, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States,
Plaintiff-Appellee,

v.

Jon Zavalidroga,
Defendant-Appellant.

No. 01-10432
D.C. No.
CR-96-00146-MMS
Northern California
(San Francisco)

ORDER

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

Appellant's petition for panel rehearing is denied. See Fed.R.App.P.40. No further filings shall be accepted in this closed appeal.

Filed December 9, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States, Plaintiff-Appellee,	No. 01-10432 D.C. No. Cr-96-0146MMS
v.	
Jon Zavalidroga, Defendant-Appellant.	MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted December 2, 2002 **

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed.R App.P. 34(a) (2).

Former federal prisoner Jon Zavalidroga appeals pro se the district court's denial of his petition for writ of coram nobis, challenging his conviction for transmitting a threatening communication in interstate commerce in violation of 18 U.S.C. 875(c). We have jurisdiction pursuant to 28 U.S.C. 1291. Reviewing de novo, see United States v. Walgren, 885 F2d 1417, 1420 (9th Cir. 1989), we affirm.

Zavalidroga contends that the district court erred in denying his writ for coram nobis as time-barred under 28 U.S.C. 2255, because he has never attacked his conviction pursuant to a 2255 motion in the district court.

In this case, Zavalidroga raises the same claims he previously raised in a time-barred writ of mandamus while he was in federal custody.1 Because Zavalidroga may not now circumvent 2255's statute of limitations by filing a writ of coram nobis, the district court properly denied the instant writ. Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir.) (stating that a "petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements."), cert. denied, 2002 WL 31308857 (November 12, 2002).

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1 United States v. Zavalidroga, No. 00-10324, 2 Fed. Appx. 787, 2001 WL 68337, at *1 (9th Cir. 2001) (memorandum) (deciding that it would be futile to construe Zavalidroga's petitions as motions under 2255 because the statute of limitations had expired).

To the extent Zavalidroga alleges that he did not file a timely petition because he relied on his appellate counsel's promise to file a 2255 motion on his behalf, this claim fails. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (recognizing that a prisoner does not have a constitutional right to counsel on collateral review); see also Wainwright v. Torna, 455 U.S. 586, 587-588 (1982) (per curiam) (deciding that a prisoner could not be deprived of effective assistance of counsel during a proceeding where there is no constitutional right to counsel).

AFFIRMED.

Filed July 9, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR-96-0146MMC

JON ZAVALIDROGA,
Defendant

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS

_____/

(Docket #106)

The Court is in receipt of defendant Jon Zavalidroga's petition, filed April 20, 2001, entitled Petition for District Court to Grant Defendant Zavalidroga's Application to the Ninth Circuit Court of Appeals for a Writ of Coram Nobis and a New Trial. In the instant petition, defendant contends that his appellate attorney provided ineffective assistance of counsel by not raising on direct appeal the issue of whether "tampered tape-recorded trial evidence" was offered against defendant at his criminal trial. (See Def's Petition at 3.)

Defendant further contends that he cannot raise this issue in a motion to vacate or set aside his sentence pursuant to 28 U.S.C. 2255 as he is no longer in custody. 1

"[A] petitioner must show the following to qualify for coram nobis relief: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987).

Defendant cannot establish the second element set forth in Hirabayashi as defendant has already attacked his conviction by raising the very claim presented in the present petition. Specifically, in his petition for a writ of mandamus filed May 24, 2000, defendant contended that his appellate attorney did not include the "physical taped-evidence tampering [issue] in his submitted appeal," (see Mandamus petition, filed May 24, 2000, at 4), and that "[c]ounsel's blatant disregard for setting out the claims of the defendant in the appeal constituted ineffective assistance of counsel." (Id.) After this Court denied defendant's petition for a writ of

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1 On June 19, 1997, following defendant's conviction for violation of 18 U.S.C. 875(c) defendant was sentenced to a ninety-day prison term and a three-year term of probation. (See Judgment, filed June 19, 1997.) Defendant's probationary term has now expired.

mandamus, (see Order Denying Writ of Mandamus, filed June 1, 2000), the Ninth Circuit affirmed, concluding that it would be futile to construe defendant's May 24, 2000 petition as a motion to vacate, set aside or correct his sentence pursuant to 2255 because any such action would be untimely. (See Memorandum, filed January 24, 2001.)

The Ninth Circuit has concluded that the claim raised in the present petition was time-barred when brought in May 2000; defendant may not circumvent that ruling by merely re-alleging the same claim in a petition for a writ of coram nobis. Accordingly, defendant's petition for a writ of coram nobis is hereby DENIED.

This order resolves docket #106.

IT IS SO ORDERED.

Dated: July 9, 2001

"s/ Maxine Chesney"
United States District
Judge

Filed June 1, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-10324
D.C. No CR-96-00146MMC

ORDER

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JON ZAVALIDROGA,
Defendant-Appellant.

Before: BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges

The mandate issued in this case on March 30, 2001 was entered in error, and therefore is recalled in order to consider the timely filed motion for stay of the mandate. See Bryant v. Ford Motor Co., 886 F.2d 1526, 1529 (9th Cir. 1989) ("Recalling the mandate is solely within the circuit court's discretion.") Because defendant-appellant has offered no valid justification for issuance of a stay of the mandate, the motion for stay of the mandate is **DENIED**.

The mandate shall issue forthwith. There also shall be no further filings accepted in this closed case.

Filed January 24, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 00-10324

Plaintiff-Appellee, D.C. No. CR-96-00146-MMC

v. MEMORANDUM 1

JON ZAVALIDROGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted January 8, 2001 2

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: BEEZER, O'SCANNLAIN and KLEINFELD, Circuit Judges.

Jon Zavalidroga ("Zavalidroga") appeals pro se from the orders of the district court denying his petition for a writ of mandamus to compel the district court to reopen his federal criminal conviction, and his petition to provide a review of his appeal from the judgment of conviction. In 1997 Zavalidroga was convicted of transmitting a threatening communication in interstate commerce under 28 U.S.C. 875(c). His conviction was affirmed by this court on July 7, 1998. Zavalidroga argues that the district court erred in refusing to conduct an inquiry into the possibility of judicial fraud in the handling and presentation of a tape recording of a telephone call. We affirm because we conclude that the district court did not abuse its discretion in denying the petitions.

A peremptory writ of mandamus is traditionally used to compel a district court to exercise its authority. Will v. United States, 389 U.S. 90, 95 (1967). "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985). A petition filed pursuant to 28 U.S.C. 2255 "provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention." Lorensten v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)(citing United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997)).

We also note that it would have been futile for the district court to construe Zavalidroga's petitions as motions to vacate, set aside or correct his sentence because he did not comply with the filing procedures mandated by 28 U.S.C. 2255. Zavalidroga's one-year time period for filing such a motion expired on July 7, 1998, long before he filed his mandamus petitions in April and May of 2000. 28 U.S.C. 2255(1); United States v. Garcia, 210 F.3d 1058, 1058 (9th Cir. 2000).

AFFIRMED.

Filed June 1, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR-96-0146-MMC

Plaintiff, ORDER DENYING WRIT OF MANDAMUS

v.

JON ZAVALIDROGA,

Defendant
_____/

On May 24, 2000, defendant Jon Zavalidroga filed a "Mandamus to Compel the Court to Provide a Review of the Appeal for Case #CR-96-0146 MMC." The Court construes this as a petition for writ of mandamus. In said petition, defendant contends that he has "continuously maintained to the courts and to all parties of record that the prosecution achieved [his] conviction entirely pursuant to high-technology professional alterations made surreptitiously to the sound on the tape-recorded trial evidence." Pet. at 1.

On April 24, 2000, defendant filed a similar paper entitled: "Mandamus to Compel the District Court to Reopen Case." Defendant's April 24, 2000 petition was denied by the Court by order dated May 3, 2000. The Court explained in its May 3, 2000 order:

A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Mandamus relief is only available to compel an officer of the United States to perform a duty if: (1) the party's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. See Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (citations omitted). The party seeking mandamus carries the heavy burden of showing all three criteria are met. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

Here, as with defendant's previous petition, defendant has failed to make the required showings. Accordingly, the Court hereby DENIES the petition for a writ of mandamus.1

IT IS SO ORDERED.

Dated: June 1, 2000

"s/ Maxine M. Chesney"
United States District
Judge

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1 The Court notes that a defendant seeking to collaterally challenge a conviction may file a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Section 2255 motions, however, are subject to a one-year statute of limitations period and it appears that more than one year has elapsed since defendant's judgment became final.

Filed May X 3, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR-96-0146MMC

JON ZAVALIDROGA,
Defendant

ORDER DENYING
WRIT OF MANDAMUS

_____/

On April 24, 2000, defendant Jon Zavalidroga filed a "mandamus to compel the district court to reopen case."

A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Mandamus relief is only available to compel an officer of the United States to perform a duty if: (1) the party's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available. See Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (citations omitted). The party seeking mandamus carries the heavy burden of showing all three criteria are met. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). Here defendant has failed to make the required showings. Accordingly, the Court hereby DENIES his petition for a writ of mandamus.

IT IS SO ORDERED.

"s/ Maxine Chesney"
MAXINE M. CHESNEY
United States District Judge

Dated: May X 3 2000

AFFIDAVIT OF COMPLIANCE

SUPREME COURT RULE 33.1 (h)

This statement is submitted in compliance with the Supreme Court Rule 33.1 (h) which limits a petition for certiorari to less than both 9,000 words and 40 pages in length.

I certify that the main body of my attached petition for certiorari, from page ix to page 16 inclusive, contains 4,252 words and is 22 pages in length.

Jon Zavalidroga, pro se

December 19, 2007
date submitted

Sworn to before me this 19th
day of December, 2007.

Crystal M. Seymore
Notary Public, Oneida County, N.Y.
My commission expires: 5/26/2010

CRYSTAL M. SEYMORE
Notary Public, State of New York
Residing in Oneida County
Registration #01SE6007828
My Commission Expires May 26, 2010

PROOF OF SERVICE - SUPREME COURT RULE 29 (5)

STATE OF NEW YORK :
SS.
COUNTY OF ONEIDA :

JON ZAVALIDROGA, being duly sworn, deposes and says: that deponent is the Petitioner in this action.

That on the 26TH day of December, 2007 deponent served the within Petition For Writ of Certiorari upon (1) Karen Beausey, U.S. Attorney's Office, 450 Golden Gate Avenue, P.O.B. 36055, San Francisco, California 94102 and (2) Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 and (3) Honorable Maxine Chesney, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102 and (4) Clerk of the Court, United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94119, the address designated by said parties for that purpose, by mailing three true copies of same to each party by certified mail, return receipt requested, enclosed in a postpaid properly addressed wrapper, in an office depository under the exclusive care and custody of the United States post office department within the State of New York.

Jon Zavalidroga
Jon Zavalidroga, pro se

Sworn to before me this
26th day of December, 2007.

Brenda L. Green
Notary Public, Oneida County, NY
My Commission Expires: 6/12/10

BRENDA L. GREEN
Notary Public, State of New York
Reg. # 04GR6043139
Appointed in Oneida County
My Commission Expires June 12, 2010